No. 851

In the Supreme Court of the United States

October Term, 1944

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The respondents, Katherine Rebecca Blacker and Taylor B. Weir, Executor of the last will and testament of Samuel T. Hauser, deceased, in opposition to the petition for writ of certiorari herein respectfully suggest to the Court:

SUMMARY OF POINTS IN OPPOSITION PETITION:

I.

Petitioner, in her assignment numbered I, has misconstrued the Montana Code, Section 7021 (Petition p. 5), which she asserts is contrary to the decision of the Circuit Court of Appeals. The Petitioner so construes that section as though a devise or bequest

would be "affected", contrary to the terms of the section, by the mere inclusion of more than one item in the devise or bequest or by the making of several gifts to the same person, whereas the prohibition of the section is merely against so construing other words of the will of not clear meaning as to whittle down or increase the estate of the donee of the prior "clear and distinct devise or bequest", or to whittle down or increase the number, area or value of the thing given.

In other words, the petitioner is here contending that by including the "residue" item of the clause second of the will in the gift to Blacker, the Circuit Court violated the Montana Code Section 7021, because, says petitioner, that added something to ("affected") the gift of "household furniture", etc. being an item before mentioned in the same clause second.

II.

Petitioner, by her assignment numbered II, contends the decision of the Circuit Court of Appeals runs counter to the law of Montana as laid down in McLure's Estate 64 Mont. 536, in that, so petitioner asserts, the Circuit Court has not given due weight to the rule laid down in that case, to the effect that a construction of the will against one who would be the natural object of the testator's bounty, should be avoided. The Montana court in the McLure case holds the first and paramount rule for construing the language of a will, to be "all the parts of a will are to be construed in relation to each other, so as, if

possible, to form one consistent whole *****" "In construing the provisions in favor of the widow, it is necessary to first arrive at the testator's intention, and that construction will be favored which will reconcile the several provisions with his intentions, for a will is to be construed according to the intention of the testator". (64 Mont. 541). The petition fails to point out wherein the decision of the Circuit Court fails to follow that rule.

III.

Petitioner specifies as her final assignment, numbered III, the failure of the Circuit Court of Appeals to remand the case to the District Court for trial of fact issues raised in the answer, as in Saunders v. Shaw, 244 US 317.

Petitioner erroneously assumes that the Circuit Court's decision is grounded on her motion for judgment on the pleadings.

The judgment of the District Court from which the appeal was taken was upon defendants' (respondents') motion to dismiss the complaint, as well as upon plaintiff's (petitioner's) motion for judgment on the pleadings.

The decision of the Circuit Court is upon defendants' (respondents') motion to dismiss the complaint, which did not in any way involve the answer.

Defendants in the trial court could not, nor could they as appellants in the Circuit Court, have judgment on plaintiff's motion whatever the grounds for that motion.

The Circuit Court in denying petitioner's petition for rehearing, raising the question of whether or not the affirmative matter set up in the answer had been considered by that Court as material to the construction of the will, has answered the question in the negative, therefore petitioner has not been denied due process.

SUPPLEMENTAL STATEMENT OF THE CASE.

Hauser's estate is being probated in the Montana State District Court, a court of general jurisdiction, (Montana Constitution Act VIII, Sec. 11.) and was so pending at the time petitioner Thatcher filed her complaint in the Federal District Court, seeking to have the latter court construe the will. (R. 3 parg. V)

The same questions of fact and law were before the State Court for decision as its final judgment in the probate. (Sec. 10328 Revised Codes of Montana 1935).

Respondents (defendants below) appeared in the Federal Court by filing their answer coupled with two motions, one objection to the jurisdiction and the other to dismiss the complaint for failure to state a claim against defendants upon which relief can be granted. (R. 9)

Petitioner (plaintiff below) then filed her motion for judgment on the pleadings (R. 12) and the three motions (defendants' and plaintiff's motions) were heard together and resulted in judgment denying defendants' (respondents') motions and granting plaintiff's (petitioner's) motion (R. 44). Appeal

from that judgment was had to the Circuit Court of Appeals, specifying as errors both the denial of the defendants' motion to dismiss the complaint and the entry of judgment on the plaintiff's motion for judgment on the pleading. (R. 52)

The Circuit Court reversed the lower court and ordered judgment for respondents (defendants) below. (R. 59)

Appellee (petitioner) filed her petition for rehearing, specifying the several points urged here, including the question of whether or not the affirmative matter of the answer is material to the construction of the will under the Circuit Court's decision (R. 72), and that petition for rehearing was denied by the Circuit Court. (R. 74)

To us petitioners stated reasons relied on in appealing to this Court for allowance of the writ of certiorari with the argument advanced in the brief that "It (the decision) will result in confusion and uncertainty as to property rights of the heirs of a resident of Montana, for there will be one rule of property for citizens of Montana and a different rule for non-residents who may resort to Federal Courts," (brief p. 24 L. 12) and then citing the Erie R. Co. case (304 US 64) as authority, in view of her resort to the Federal Court in order to anticipate the then pending decision of the State Court construction of this will, seem inconsistent and so contrary to justice as to warrant denial of the petition, without more, for the non-resident voluntarily goes into the Federal

Court anticipating a different result than would be reached in the State Court.

No violation of the Rule that the Statutes and Decisions of the State shall Control Federal Court Decisions in Matters of "General" law, as well as in Matters of "Local" law, announced in the Erie R.R. Case (304 US 64), can be spelled out of the Decision. (Assignments Nos. I & II of Reasons)

Petitioner, in her assignment of reasons Number I (Petition p. 7 brief pp 13-18) contends (1) that the decision is contrary to the Montana Code section 7021 set out at page 5 of the petition, and (2) contrary to the decision of the Montana Court in McLure's Estate, 62 Mont. 536, 208 Pac 900, and therefore, petitioner contends, the decision fails to follow the rule laid down in the Erie R.R. case to the effect that state statutes and decisions shall control Federal Court decisions in matters of "general" as well as "local" law.

MONTANA CODE SECTION 7021.

We think petitioner misconstrues the section 7021, and that it has no relation to the matters involved in the decision here.

The Montana Court has not construed the section 7021. We think the purpose of that section to be only that where the testator has made a devise or bequest in clear and distinct language, then the section *pro-*

tects the integrity of that grant against being whittled away by "any other words not equally clear."

For example, if the testator has made a grant of "Black Acre" in fee simple, that estate is not to be cut down to some lesser interest, and the designation "Black Acre" being "clear and distinct" as to its identity, the wood lot is not to be excluded from the grant, "by any other words not equally clear and distinct", or "by any reasons assigned (by the testator) therefor", or "by an inaccurate recital (by the testator) of or reference to its contents in another part of the will."

As we understand the petition, it is there contended that the section 7021 precludes the inclusion of the "residue item" in the Clause Second from the gift to Blacker, because petitioner says that would be adding something to the gift of "household furniture, etc." and would, (the petitioner contends) therefore "affect" the bequest of "household furniture, etc." in violation of the Section 7021.

The bequest of the item "household furniture" is no more "affected" by the inclusion of the additional item — the "residue" item — than it is by the inclusion of the item "silverware". Nothing is added to or taken from the "bequest of household furniture" by the testator giving to the same donee some other or different property.

Moreover, the description "all household furniture, table ware, pictures, silverware & jewelery", in the absence of the word "my" before the words "house-

hold furniture", is neither "clear" nor "distinct" in the meaning of the section 7021, until we identify "household furniture" by the later words "of my estate" contained in the language petitioner would have us reject.

Therefore the decision is not in conflict with the state section 7021.

DECISION NOT IN CONFLICT WITH McCLURE CASE.

The Montana codes (1935) contain 39 sections (7016 to 7054), setting out the commonly accepted rules for construction of wills, among which are,

"Section 7016, A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."

"Section 7020. All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail."

"Section 7024. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative"; and

"Section 7025. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy."

The Montana Court in the McLure case, wherein the question for decision was not as to who would

take under the will, but who, among a creditor, O'Connor and Gow, the nominee of both children and the widow, had the preference right to appointment as administrator c.t.a., announces an additional rule (additional to the 34 code sections), viz.

"Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law would have given to her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language." (63 Mont. p. 541).

In the McLure case the question of interpretation of the will was only incidental to the further question of whether or not the widow took any part of the personal estate, thereby qualifying her to nominate for the appointment of administrator, and the latter question was not necessary to the court's decision. Both the children (who were qualified to nominate) and the widow (whose right to nominate was in question) having nominated Gow, as against the creditor O'Connor, the State court says, as to Gow's appointment:

"it cannot be said whether the trial court in making the appointment of Gow heeded the request made by the three children or was guided by the nomination made by the widow. In either event the order would be sustained." (63 Mont. 544)

The will in the McLure case provided, first:

A small money bequest to one granddaughter, and to a second granddaughter such share of the estate

as her father *would have taken under* the *laws* of *succession* if he were living, then provides that "all of the remainder of my property shall be divided equally among my six children now living", and then after nominating an executor and immediately before the date line and signature is the provision: "My wife shall be endowed in my estate, real and personal, in Montana as under the law of Montana, real in any other state as under the law of such state". No other provision was made for the wife. (63 Mont. 540)

It was contended that by the use of the word "endowed", the widow took in the real property only, and not in the personal property and therefore, under the Montana statutes, had no right to nominate an administrator.

We, therefore, find the decision in the McLure case on the question of will construction, to be limtied to the holding that the word "endowed" used in the will was to be given its dictionary meaning, and the meaning as used in the marriage ceremony "with all my worldly goods I thee *endow*", rather than confine it to the meaning of the technical term as used in reference to interest in real property.

And in reaching that conclusion, the state court recognized the paramount rule:

"In construing the provision in favor of the widow, it is necessary to first arrive at the testator's intention, and that construction will be favored which will reconcile the several provisions with his intention, for a will is to be construed according to the intentions of

the testator. (Sec. 7016, Rev. Codes 1921)" 63 Mont. 536.

The petition here fails to point out wherein the decision here is in conflict with the body of rules of construction of wills for which the McLure case holds.

NO ISSUE OF ESSENTIAL FACT LEFT TO BE TRIED UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS

(Assignment No. III of Reasons)

There was no issue of essential fact left to be tried after the decision of the Circuit Court of Appeals.

The cause went to the Circuit Court of Appeals from the judgment of the District Court. The judgment of the District Court was given upon defendants' (respondent's) motion to dismiss the complaint upon the ground (among others) that the complaint fails to state a claim against defendants, or either thereof, upon which relief can be granted, (R. 9), and upon plaintiff's (Petitioner's) motion for judgment upon the pleadings (R. 12), and the two motions being heard together the judgment of the District Court is upon defendants' (respondents') motion to dismiss, as well as upon plaintiff's (petitioner's) motion for judgment on the pleadings (R. 44)

By this specification petitioner contends she has been deprived of due process, in that the Circuit Court of Appeals failed to remand the cause for trial of the issues of fact pleaded in the answer to the ef-

fect that Hauser had been estranged from his sister (petitioner) for many years and was engaged to be married to Blacker, etc. (respondent). (R. 9, 10, & 11).

The Circuit Court at the conclusion of its opinion, adverted to these matters as follows:

> "We conclude that the will gives the entire estate of the decedent to appellant Blacker.
>
> "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction. ***** Those circumstances, as detailed in appellants' answer, are admitted to be true by the motion for judgment on the pleadings." (R. 70)

By its decision, the Circuit Court has decided this case upon appellants' (respondents') motion to dismiss the complaint for failure to state a claim upon which relief may be granted, presented to the trial court and decided by the trial court against these respondents, (R. 44) and from which judgment the appeal to the Circuit Court of Appeals was prosecuted, specifying this action of the trial court as error. (R. 52 specification 2).

For the purpose of that motion to dismiss, the complaint alone was in question and the allegations of the answer could not have been considered by the Court, and, therefore, could not have been the basis for or material to the decision.

As the matter stood before the Circuit Court of

Appeals, the motion to dismiss the complaint must necessarily have been the basis for decision construing the will in favor of appellants (respondents), for appellants had made no motion for judgment on the pleadings.

Moreover, as the record now stands, the Circuit Court of Appeals, in denying petitioner's (appellee in Circuit Court) motion for rehearing, has held that the fact allegations of the answer upon which petition here claims right of trial were not essential or material to its decision construing the will.

Petitioner's (appellee below) by specification IV (R. 72) of her petition for rehearing before the Circuit Court, presented this very question to that Court in the following language:

"IV"

"If this Court finally decides that the affirmative matters alleged in the answer are material to the construction of the will, the case must be remanded to the District Court for trial of the issues of fact raised by the answer."

By it's denial of that petition, the Circuit Court necessarily held the affirmative matters alleged in the answer are not material to its decision construing the will — that such facts are not essential to its decision.

Therefore, petitioner is before this Court asking this Court to find as a matter of law that the affirmative matters set up in the answer are essential to a construction of Hauser's will, and that upon such

finding she has been deprived of right to trial of those matters in violation of the Federal Constitution.

We respectfully submit the petition should be denied.

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